NO. 35370-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JERREMY JOE GMEINER,

Defendant/Appellant.

BRIEF OF APPELLANT

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2. A. The trial court's failure to examine the child at a child hearsay hearing, in either the first or second trial, contravenes the statutory requirements of RCW 9A.44.120 and existing case law.

B. The trial court's Findings of Fact 37, 38, 39, 40 and Conclusions of Law 1, 2, 3 and 4 were entered without having the child appear in court and are speculative at best. (CP 103-104; Appendix "A")

3. Defense counsel was ineffective when he agreed to not have the child appear at the child hearsay hearing.

4. A. The prosecuting attorney committed misconduct during cross-examination of Mr. Gmeiner when he questioned him about whether or not his sister was lying when she testified.

B. The prosecuting attorney elicited improper opinion testimony from Detective Satake.

5. Cumulative error deprived Mr. Gmeiner of a fair and impartial trial under Const. art. I, §§ 3 and 22 as well as the Fourteenth Amendment to the United States Constitution.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the trial court's declaration of a mistrial when the jury foreperson indicated that the jury was deadlocked, without making any additional inquiry, precipitate a violation of the double jeopardy provisions of the Fifth Amendment to the United States Constitution and Const. art. I, § 9?

2. Does the trial court's failure to examine a child at a child hearsay hearing, as required by RCW 9A.44.120, require reversal of Mr. Gmeiner's conviction and remand for a new trial?

3. Can the trial court's Findings of Fact and Conclusions of Law be supported without the court having the child appear to be examined as to her credibility, the reliability of her statements and her availability to testify?

4. Was defense counsel ineffective when he stipulated to not having the child present at the child hearsay hearing?

5. Did prosecutorial misconduct occur during cross-examination of Mr. Gmeiner concerning whether or not his sister had lied during her testimony?

6. Did prosecutorial misconduct occur when improper opinion testimony was elicited from Detective Satake?

7. Does cumulative error require reversal of Mr. Gmeiner's conviction and remand for a new trial?

STATEMENT OF THE CASE

Sarah Gmeiner is Mr. Gmeiner's sister. She has a three-year-old daughter A.B.G. who was born on May 31, 2013. (Cochran RP 265, ll. 24-25; RP 266, ll. 5-6; ll. 18-19; RP 752, ll. 16-17)

Mr. Gmeiner lived with his sister and her family for approximately one (1) year. After he moved out he would see them every few months. Ms. Gmeiner's children loved Mr. Gmeiner and there were no apparent conflicts. (Cochran RP 268, ll. 3-7; ll. 12-14; RP 269, ll. 1-2; RP 754, ll. 19-25)

On September 21, 2016 Mr. Gmeiner contacted his sister for a massage. She is both a licensed massage therapist and a physical therapist. He arrived later that day, received the massage, and they then visited. (Cochran

RP 270, l. 6; RP 271, ll. 14-22; RP 273, ll. 2-6; RP 753, l. 6; RP 756, ll. 16-17; RP 757, l. 24 to RP 758, l. 4)

While Mr. Gmeiner and his sister were visiting A.B.G. was playing with a dump truck in his lap. Mr. Gmeiner told her to stop playing in his lap. His sister also directed the child to quit playing in Mr. Gmeiner's lap. She did not listen. (Cochran RP 277, ll. 8-19; RP 764, ll. 23-25; RP 765, ll. 2-10)

Ms. Gmeiner then noticed that Mr. Gmeiner was not listening to her. She observed him looking at the child in a way that she described as being sexually aroused and/or lustful. (Cochran RP 277, l. 20 to RP 278, l. 22; RP 766, ll. 4-22; RP 767, ll. 6-12)

After observing her brother's look Ms. Gmeiner stood up and so did Mr. Gmeiner. Her son who was playing a video game in the basement then screamed hysterically. She immediately went downstairs to take a cell-phone away from him. A.B.G. started to follow her downstairs but did not do so. Mr. Gmeiner was standing in the living room at that time. (Cochran RP 278, l. 23 to RP 279, l. 19; RP 280, ll. 4-13; ll. 4-13; RP 768, ll. 3-7; RP 769, l. 18 to RP 770, l. 1; ll. 8-20)

Ms. Gmeiner was only in the basement for a short period of time. She immediately went back upstairs and observed Mr. Gmeiner and A.B.G. between a couch and chair in the living room. Mr. Gmeiner was on his

knees. A.B.G. was standing between his legs. Their foreheads were touching. (Cochran RP 281, ll. 4-23; RP 282, ll. 1-7; RP 771, ll. 4-9; RP 772, ll. 4-17)

Ms. Gmeiner observed Mr. Gmeiner with his hand inside his shorts. He appeared to be masturbating. He was humping and appeared to be touching A.B.G. on her abdomen and vagina. Ms. Gmeiner only saw his right side profile and could not see his left hand. (Cochran RP 282, ll. 16-20; RP 283, ll. 2-10; RP 283, l. 21 to RP 284, l. 1; RP 284, ll. 11-16; RP 773, ll. 1-11)

Ms. Gmeiner observed that the same hand which Mr. Gmeiner was using to masturbate was the hand on A.B.G.'s abdomen. His penis was not exposed. She believed his pelvis was thrusting against A.B.G. Mr. Gmeiner's breathing was heavy and he was moaning. (Cochran RP 284, ll. 17-25; RP 285, ll. 19-22; RP 286, ll. 11-19; RP 773, ll. 12-16; ll. 19-24; RP 774, ll. 15-23)

When Ms. Gmeiner stepped in between the child and her brother he jumped up, removing his hand from his shorts, and said "What did you think you saw?" (Cochran RP 288, ll. 16-20; RP 314, ll. 1-20; RP 776, ll. 4-15)

Ms. Gmeiner told her brother to get out. After he stepped out the door she looked out a side door and saw him adjusting his shorts. He had

an obvious erection. (Cochran RP 289, l. 11 to RP 290, l. 7; RP 777, ll. 1-5; RP 778, ll. 20)

Ms. Gmeiner never saw Mr. Gmeiner's penis. She does not know if he had a climax. No fluids were seen. When she told him that she saw him masturbating he did not deny the accusation. (Cochran RP 779, ll. 21-25; RP 781, ll. 3-19)

Ms. Gmeiner first called her mother and then called 9-1-1. She did not advise the 9-1-1 operator or her mother that she saw Mr. Gmeiner's hand and/or penis touching A.B.G.'s vaginal area. (Cochran RP 320, ll. 21-25; RP 820, ll. 20-23; RP 822, ll. 2-5; RP 828, ll. 20-22; RP 833, ll. 10-14; RP 834, ll. 1-6)

Deputy VanPatten interviewed Ms. Gmeiner later in the evening. Ms. Gmeiner advised her that she saw Mr. Gmeiner masturbating in front of her daughter. His hips were thrusting forward and his hand was in his pants. His eyes were open and his forehead was the only portion of his body touching her daughter. (Cochran RP 327, ll. 1-2; RP 339, ll. 6-9; RP 340, ll. 16-23; RP 347, ll. 2-15; RP 348, ll. 6-19; RP 884, ll. 14-20)

Later that evening Ms. Gmeiner and her mother were having a discussion about what occurred. A.B.G. was present. She asked - "Mom, are you mad at Jerremy?" Ms. Gmeiner answered - "Yeah, Ava, I'm very mad

at Jerremy. Do you know why?" A.B.G. - "Yes, because Jerremy touched my butt." (Cochran RP 399, ll. 1-7; RP 788, ll. 1-23)

A.B.G. generally refers to her lower anatomy as her "butt." (Cochran RP 293, ll. 8-20; RP 789, ll. 5-8)

On September 22, 2016 Mr. Gmeiner contacted 9-1-1. Deputy Ennis responded. Mr. Gmeiner wanted to tell his side of what occurred. (Cochran RP 353, ll. 2-5; RP 354, ll. 19-20; RP 355, ll. 19-23; RP 859, ll. 12-13)

Mr. Gmeiner told Deputy Ennis that he was carrying A.B.G. upstairs when she kicked him in the groin. He had his hand in his pants trying to straighten out his boxers. He denied that his penis was hard. (Cochran RP 362, ll. 7-13; RP 370, ll. 11-19; RP 394, ll. 14-17; RP 395, ll. 15-16; RP 866, l. 17 to RP 867, l. 6; RP 871, ll. 16-17; RP 905, l. 5 to RP 906, l. 15)

An Information was filed on September 30, 2016 charging Mr. Gmeiner with first degree child molestation. (CP 1)

A child hearsay notice was issued on November 7, 2016 and again on November 29, 2016. (CP 9; CP 11)

A child hearsay hearing was conducted on December 5, 2016. A.B.G. did not appear or testify. (Cochran RP 8, l. 11 to RP 9, l. 10)

Ms. Gmeiner testified at that hearing. She essentially went through and testified to what occurred on September 21, 2016. (Cochran RP 50, l.

13 to RP 51, l. 14; RP 53, ll. 19-25; RP 54, ll. 16-25; RP 56, l. 3 to RP 58, l. 3; RP 58, ll. 9-17; RP 59, l. 19 to RP 60, l. 1; RP 61, ll. 12-15)

Ms. Gmeiner then told the Court that A.B.G. had never been exposed to anything sexual. It was her opinion that her daughter had no idea what happened and was already over it. (Cochran RP 70, ll. 2-3; ll. 12-13)

Ms. Gmeiner was then questioned concerning A.B.G.'s truthfulness. The following exchange occurred:

> Q. How verbal is Ava?
>
> A. She's 3 ½. She knows how to talk and communicate pretty well, five, six, seven words at a time for sentences.
>
> Q. Have you ever talked to Ava about telling the truth versus lying?
>
> A. Um, for being her age, I talk to her age-appropriately about telling the truth versus -- I don't know if a 3-year-old necessarily lies. But she will -- she's 3, so I'll direct her appropriately.
>
> Q. What have you told her about telling lies?

A. Like I said, I don't think we even really talk about telling lies in the family.

Q. Have you had any problems with Ava since she's been verbal with her telling you things that weren't true?

A. No.

(Cochran RP 44, l. 15 to RP 45, l. 4)

Mr. Gmeiner proceeded to trial beginning December 5, 2016. The jury left the courtroom to deliberate at 11:28 a.m. on December 7, 2016. They returned at 3:01 p.m. The Court declared a mistrial after the jury foreman advised that the jury was deadlocked. (CP 47; CP 48)

The discussion concerning the deadlocked jury involved the trial judge, prosecuting attorney and defense counsel. Both attorneys were hesitant to have a mistrial declared; but deferred to the trial court's discretion. The entire discussion is attached as Appendix "B." (Cochran RP, l. 494 to RP 503, l. 25)

During the second trial the prosecuting attorney examined Detective Satake on the reasons why a forensic interview was not done of the child. The detective briefly described his training for conducting forensic interviews. (Cochran RP 836, ll. 23-25; RP 841, ll. 2-8; RP 841, l. 9 to RP 842, l. 2)

The prosecuting attorney then proceeded to elicit an opinion from the detective concerning Ms. Gmeiner's ability to recall details of the events in question. The interview was a telephone interview lasting twenty-three (23) minutes. (Cochran RP 843, l. 18 to RP 844, l. 19; RP 845, ll. 1-4; Appendix "C")

During the prosecuting attorney's cross-examination of Mr. Gmeiner he repeatedly, over objection, asked Mr. Gmeiner to comment on his sister's credibility.

> Q. So the testimony coming from Sarah, then, is in your view what she believes to be the truth?
>
> MR. CHARBONNEAU: Objection, Judge. Commenting on the testimony. Is there -- could we rephrase?
>
> THE COURT: Yeah, I -- I have a --
>
> A. I'm not sure what --
>
> THE COURT: Let's have --
>
> A. -- what you're asking.
>
> THE COURT: -- you rephrase that, please.
>
> MR. MARTIN: Okay.

Q. Well, do you believe that Sarah's lying about you?

A. Do I believe she's lying about me?

MR. CHARBONNEAU: Objection, Judge.

THE COURT: Overruled.

A. I do. I believe that she had made it up. But as time's gone on, I realize now that even me and my memory of the -- the events of that day are different. The simplest thing, being dropped off at that -- at the home by a buddy of mine, I'd -- I'd completely forgotten that. It's six months now, seven, eight months later that I remember that -- that he had told me and I remember. I don't think she thinks -- I don't believe that she's actually trying to lie about me. I think she seen it as her -- her way and she -- she's going to stick by that. Um, I don't think she's purposefully trying to lie about me, but they -- in my mind they are lies.

(Cochran RP 954, l. 12 to RP 955, l. 11)

The prosecuting attorney's closing argument implied defense counsel accused Ms. Gmeiner of lying:

> MR. MARTIN: The defense has to walk a really fine line in this case between saying Sarah Gmeiner is lying and Sarah Gmeiner is mistaken. Mr. Zeller very honorably does not want to simply attack this mother. He says he believes her and that she's just mistaken. But that really -- if you listen to some of the arguments, though, the only explanation for some of the things that she said is if she is actively, knowingly, purposefully lying to implicate her brother in a child molestation claim.

(Cochran RP 1028, ll. 13-21)

The jury determined that Mr. Gmeiner was guilty of the offense. (CP 76)

Judgment and Sentence was entered on May 24, 2017. (CP 112)

Mr. Gmeiner filed his Notice of Appeal on May 31, 2017. (CP 131)

An Order Amending Judgment and Sentence was entered on August 16, 2017 concerning the term of community custody. (CP 139)

SUMMARY OF ARGUMENT

The trial court's declaration of a mistrial was premature. Jeopardy had attached. The trial court's failure to conduct a further inquiry concerning the claimed deadlock was an abuse of discretion and adversely impacted Mr. Gmeiner's constitutional rights under the Sixth Amendment to the United States Constitution and Const. art. I, § 9. The double jeopardy violation requires that his conviction be reversed and the case dismissed.

RCW 9A.44.120 mandates that a child appear at a child hearsay hearing so to be examined as to competency. The Court is then required to enter findings of fact and conclusions of law as to the child's competency, availability to testify and reliability. The failure of the trial court to examine the child requires reversal and remand for a new trial.

Defense counsel was ineffective when he stipulated to the unavailability and competency of the child witness.

Prosecutorial misconduct deprived Mr. Gmeiner of a fair and impartial trial under the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3. The misconduct consisted of asking Mr. Gmeiner if

his sister was lying, as well as eliciting an opinion on the sister's credibility from Detective Satake.

Cumulative error requires reversal of Mr. Gmeiner's conviction and remand for a new trial.

ARGUMENT

I. MISTRIAL

The Fifth Amendment to the United States Constitution provides, in part:

> No person shall be held … nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ….

Const. art. I, § 9 states: "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

The question of whether double jeopardy comes in to play in connection with the declaration of a mistrial is dependent upon a number of factors.

> Jeopardy may be terminated in one of three ways: (1) when the defendant is acquitted, (2) when the defendant is convicted and that conviction is final, or (3) when the court dis-

> misses the jury without the defendant's consent and the dismissal is not in the interest of justice.

State v. Strine, 176 Wn.2d 742, 752, 293 P.3d 1177 (2013).

In Mr. Gmeiner's situation neither defense counsel nor the prosecuting attorney were eager for the court to declare a mistrial. After considerable discussion, with numerous suggestions being made to the court by both counsel, a mistrial was declared.

The trial court declared the mistrial solely upon the jury foreperson's assertion that the jury was deadlocked. No further inquiry of any kind was made. Mr. Gmeiner contends that in the absence of that inquiry the mistrial should not have been declared.

In *State v. Jones*, 97 Wn.2d 159, 160-61, 641 P.2d 708 (1982) a mistrial was declared in a first-degree rape trial. The jury had been instructed at 11:10 a.m. and retired to begin deliberations. At 10:35 p.m. the trial court called the jurors into the courtroom to determine whether or not there was a possibility of a verdict. The jury foreperson announced there was. At midnight the court again called the jury into the courtroom asking the juror foreperson if a verdict could be reached by 1:30 a.m. When the foreperson indicated there was no such possibility the court declared a mistrial without seeking the opinions of either attorney.

The trial court in Mr. Gmeiner's case received opinions from defense counsel and the prosecuting attorney. Their reluctance to have a mistrial declared is evident. However, they eventually placed the issue in the court's discretion.

What is interesting is that the jury in Mr. Gmeiner's case had deliberated for only approximately four (4) hours. Without further inquiry from the court there is no way to determine whether or not the jurors were truly deadlocked.

The *Jones* Court, *supra,* 162, recognized that a defendant has a valued right to have his trial completed by a particular tribunal relying upon *Arizona v. Washington,* 434 U.S. 497, 503 n. 11, 98 S. Ct. 824, 54 L. Ed.2d 717 (1978).

The *Jones* Court further relied upon *State v. Connors,* 59 Wn.2d 879, 883, 371 P.2d 541 (1962) in determining whether or not a mistrial had been properly declared. As that court noted:

> This court in *Connors* made these observations on the necessity of discharging a hung jury:
>
> > [I]t is universally recognized that a jury which, **after a reasonable time**, cannot arrive at a verdict, may be discharged and the defendant tried again. Even so, a too quick discharge of a hung jury would be held a violation of

> the defendant's right to a verdict of that jury ….

(Emphasis supplied.)

Mr. Gmeiner contends that a jury declaring itself deadlocked after only four (4) hours of deliberation does not constitute a reasonable time period for discharge. Rather, it is his position that the trial court should have conducted further inquires as recognized in both the *Jones* and *Strine* cases.

Relying upon *State v. Bishop,* 6 Wn. App. 146, 150, 491 P.2d 1359 (1971), *review denied,* 80 Wn.2d 1006 (1972), the *Jones* Court stated at 163:

> The test has been well stated by the Court of Appeals as follows:
>
> > Is there the presence of extraordinary and striking circumstances which clearly indicate to a court in the reasonable exercise of its discretion that the ends of substantial justice cannot be obtained without discontinuing the trial[?].

There are no extraordinary and striking circumstances involved in the record to support the trial court's discharge of the jury. The trial court abused its discretion when it granted a mistrial. As the *Jones* Court went on to announce at 164:

> … [T]here must be a factual basis for the exercise of the discretion to discharge a jury; "extraordinary and striking circumstances"

> must exist before the judge's discretion can come into play. … The jury's acknowledgement of hopeless deadlock is an "extraordinary and striking" circumstance which would justify the judge's exercise of his discretion to discharge the jury. In exercising that discretion, the judge should consider the length of time the jury had been deliberating in light of the length of the trial and the volume and complexity of the evidence. *State v. Boogaard,* 90 Wn.2d 733, 749, 585 P.2d 789 (1978).

Mr. Gmeiner's trial was a day and a half trial. The issues were not complex. The fist day of trial was spent selecting a jury. There was no expert testimony involved. It was a he said/she said case.

As the *Strine* Court stated at 753:

> "A hung jury is an unforeseeable circumstance requiring dismissal of the jury in the interest of justice." *Ervin,* 158 Wn.2d [*State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006)] at 753 (citing *Green v. United States*, 355 U.S. 184, 188, 78 S. Ct. 221, 2 L. Ed.2d 199 (1957)). "[I]t is universally recognized that a jury which, **after a reasonable time**, cannot arrive at a verdict, may be discharged and the defendant tried again." *State v. Connors,* 59 Wn.2d 879, 883, 371 P.2d 541 (1962) …. **The disagreement between the jurors must be evident from the record**. *Selvester v. United States,* 170 U.S. 262, 269, 18 S. Ct. 580, 42 L. Ed.1029 (1898); *see also State v. Daniels,* 165 Wn.2d 627, 639, 200 P.3d 711 (2009) (Sanders, J., dissenting) (citing *Ervin* for the proposition that a hung jury

> requires an "express" and "formal … statement of disagreement by the jury on the record").

(Emphasis supplied.)

The disagreement between the jurors cannot be determined from the record. There is the simple statement from the jury foreperson that they were deadlocked. The trial court made no further inquiry of the foreperson. A further inquiry was required.

The *Jones* Court went on to say at 164-65:

> After ascertaining how the jury stands numerically (but not with respect to guilt or innocence), the judge may be better able to determine whether further deliberations might resolve the deadlock. …
>
> This, then is the setting in which the discretion to declare a mistrial operates. After considering the length and difficulty of the deliberations, and making such limited inquiries of the jury as not amount to impermissible coercion, the judge must then determine whether to exercise his discretion to discharge the jury. It is this determination, weighing the relevant considerations, which is subject to great deference to a reviewing court and which will not lightly be upset.

Both counsel provided the trial court with some options. The trial court decided not to exercise any of those options. A reasonable option would have been to find out if the jury wanted to retire for the day and return in the morning for continued deliberations. This was not done.

As approved in *Jones*, the trial court could have asked for a show of hands as to whether all of the other jurors agreed with the foreperson's statement. Again, this was not done.

Finally, the *Jones* Court stated at 166:

> He did not explore any alternative to discharging the jury. He did not question the foreman or the jury as to whether a verdict would be possible if they deliberated longer than 90 minutes. Of more significance, considering the lateness of the hour, is the fact that he did not explore the possibility of the jurors' resuming their deliberations the following morning. In other words, the judge did not establish that the jury considered itself genuinely deadlocked, but only that, in the middle of the night, it could not reach a verdict within 90 minutes.

There can be no doubt that jeopardy had attached in Mr. Gmeiner's first trial. "Jeopardy attaches after the jury is selected and sworn." *State v. Cedillo-Juarez,* 115 Wn. App. 881, 887, 64 P.3d 83 (2003) (*citing Downum v. United States*, 32 U.S. 734, 737, 83 S. Ct. 1033, 10 L. Ed.2d 100 (1963)).

A trial court abuses its discretion when there is

> a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court clearly abused its discretion in Mr. Gmeiner's case. In the absence of additional inquiry of the jury foreperson and jurors the declaration of a mistrial and discharge of the jury was exercised on untenable grounds and for untenable reasons.

II. CHILD HEARSAY

RCW 9A.44.120 provides:

> A statement made by a child when under the age of ten describing any act of sexual conduct performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another … not otherwise admissible by statute or court rule, is admissible in … criminal proceedings, … in the court of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
> (2) The child either
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness **PROVIDED,** That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Mr. Gmeiner argues in the absence of the child at the child hearsay hearing, along with the stipulation as to competency and unavailability, resulted in the trial court abusing its discretion. The later entry of the findings of fact and conclusions of law determining the statements to be admissible

amounts to speculation and contravenes the necessity of the child's required presence.

The statute requires the child's appearance. An in-court determination of the child's competency and reliability is necessary. It cannot be obtained when the child is not examined.

A claim by the prosecuting attorney, or the mother, that the child would be unable to testify is insufficient to meet the statutory criteria.

Mr. Gmeiner relies upon *State v. Hopkins*, 137 Wn. App. 441, 154 P.3d 250 (2007) to support the position he takes in this section of his brief. The factual predicates in *Hopkins* substantially parallel the factual predicates in Mr. Gmeiner's case.

As the *Hopkins* Court observed at 445-46:

> Rather than call M.H., the State proposed to call Samantha Hannah (M.H.'s mother), Janet Blake (Hannah's mother), and Patricia Mahaulu-Stephens, a Child Protective Services (CPS) social worker, to testify about M.H.'s hearsay disclosures to them concerning her allegations against Hopkins. **The trial court held a child hearsay hearing to determine whether M.H.'s hearsay statements were admissible under the child hearsay statute. During the child hearsay hearing, the trial court heard testimony from the State's three adult witnesses. But it did not interview M.H., and Hopkins' counsel did not object to the trial court's failure to interview the child.**

> **Nor did the trial court conduct a child competency hearing under RCW 9A.44.120. Instead, the State and defense counsel agreed that M.H. was incompetent to testify based on "her young age."** The trial court made no express findings about whether M.H. was incompetent and therefore, unavailable to testify for purposes of RCW 9A.44.120.
>
> Nonetheless, the trial court ruled that M.H.'s hearsay statements to the State's three adult witnesses were admissible based on *State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003), and *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984), because her statements bore evidence of reliability and there was sufficient corroborating evidence under RCW 9A.44.120.

(Emphasis supplied.)

This is exactly what occurred in Mr. Gmeiner's case at the child hearsay hearing.

The *Hopkins* Court clearly found that the trial court improperly admitted M.H.'s statements. The Court ruled at 449-51 as follows:

> … [I]n *Ryan*, our Supreme Court expressly ruled that the RCW 9A.44.120 requirement also applies to RCW 9A.44.120(2). The court held that: (1) **"[s]tipulated incompetency based on an erroneous understanding of statutory incompetency is too uncertain a basis to find unavailability" and** (2) **the trial court must determine a child's competency within the framework of RCW 5.60.050 by conducting a compe-**

> **tency hearing to examine the child's manner, intelligence, and memory.** 103 Wn.2d at 172. …
>
> … **Absent compliance with the strict requirements of RCW 9A.44.120** or falling within some exception to the rules of evidence generally excluding hearsay, **a child hearsay statement is simply inadmissible as a matter of law when the child does not testify at trial.**
>
> Finding *Ryan* controlling, we hold that (1) the trial court erred in presuming M.H.'s incompetency from her age, in spite of the parties' apparent agreement; (2) the trial court erred in failing to conduct a competency hearing and to enter the statutorily required findings before finding M.H. "unavailable" to testify at trial; (3) therefore, M.H.'s hearsay allegations of Hopkins' sexual contact were not admissible under RCW 9A.44.120; and (4) because M.H.'s hearsay statements were not otherwise admissible the trial court improperly allowed them into evidence.

(Emphasis supplied.)

The presumption by the trial court, the prosecuting attorney, the mother, and in part by defense counsel, that A.B.G. was not competent to testify creates a void in Mr. Gmeiner's defense that cannot be filled through simple cross-examination of the mother and grandmother.

The void involves the word "butt." Both the mother and grandmother testified that "butt" meant all of the child's lower anatomy.

The central question is what portion of that anatomy that Mr. Gmeiner may have touched. Only the child could truly say.

Sexual contact as defined in WPIC 45.07 was what the jury had to determine. The juror question submitted to the Court during the course of deliberations highlights the critical nature of that definition. (CP 77; Appendix "D")

What portion of A.B.G.'s "butt" was touched, if any? We do not know. The jury did not know.

> Contact is "intimate" within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper. Which anatomical areas, apart from genitalia and breasts, are "intimate" is a question for the trier of fact.

State v. Jackson, 145 Wn. App. 814, 819, 187 P.3d 321 (2008).

Ms. Gmeiner saw Mr. Gmeiner with his right hand inside his shorts apparently masturbating. She did not see his left hand. She testified that Mr. Gmeiner had his forehead against A.B.G.'s forehead. The child was standing between his legs as he kneeled on the floor.

As argued in a later portion of this brief, Ms. Gmeiner did not provide specific details of any touching, except the forehead, until the telephonic interview with Detective Satake.

Without an explanation from the child as to where the touch occurred and the type of touch it was the jury was left blind.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

> To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Mr. Gmeiner claims that defense counsel was deficient in representing him and he did not receive effective assistance of counsel as provided in the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

A combination of factors points toward Mr. Gmeiner's ineffective assistance claim. These include: the failure to request that the child appear in court for the child hearsay hearing; the stipulation at the child hearsay hearing concerning competency and unavailability; and the failure to object to prosecutorial misconduct.

Defense counsel should have been aware of *State v. Hopkins, supra* and *State v. Ryan*[1]*, supra*. Failure to bring those cases to the trial court's attention at the time of the child hearsay hearing was deficient performance. It also prejudiced Mr. Gmeiner at the trial since neither the jury nor the trial court ever had the opportunity to ascertain either the reliability or competency of A.B.G.

> … "[R]easonable conduct for an attorney includes carrying out the duty to research the relevant law." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) ….
>
> Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient. [numerous cases cited with regard to deficient performance including RPC 1.1, cmp. 2] …Indeed, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S., 134 S. Ct. 1081, 1089, 188 L. Ed.2 1 (2014).

Personal Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 138 (2015).

The combination of factors previously set out meet the criteria for ineffective assistance of counsel.

[1] *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

IV. PROSECUTORIAL MISCONDUCT

> A prosecutorial misconduct inquiry … consists of two prongs: (1) whether the prosecutor's comments were improper and (2) if so, whether the improper comments caused prejudice.

State v. Lindsay, 180 Wn.2d 423, 431, 326 P.3d 125 (2014).

The prosecuting attorney's cross-examination of Mr. Gmeiner, along with the testimony elicited from Detective Satake on Ms. Gmeiner's credibility, had a direct impact on the case. Ms. Gmeiner was the one introducing the child hearsay statements and her observations/opinions on what occurred.

Mr. Gmeiner contends that the prosecuting attorney's closing argument involving defense counsel's characterization of Ms. Gmeiner's testimony undermined defense counsel's integrity. The examples set out in *State v. Lindsay* where prosecuting attorneys used terms such as "bogus," "sleight of hand," "crock," "twisting the words of witnesses," and "camouflaging the truth" are substantially similar to what occurred in this case. *See: State v. Lindsay, supra,* 433.

Moreover, and more importantly, the examination of Detective Satake asking him to comment on Ms. Gmeiner's credibility exacerbated the cross-examination of Mr. Gmeiner.

The combination of the cross-examination of Mr. Gmeiner and the direct examination of Detective Satake centers on the credibility of Ms. Gmeiner. "Asking one witness whether another witness is lying is flagrant misconduct." *State v. Boehning*, 127 Wn. App. 511, 525, 111 P.3d 899 (2005).

The examination of the defendant in the *Boehning* case is eerily similar to the cross-examination of Mr. Gmeiner.

> Q: So there would be no reason for [H.R.] to be upset with you because of disciplining, since you never disciplined her, or any other kids.
> A: I have no reason why she's mad at me.
> Q: That's right, and that's what you told the detective you can think of no reason for [H.R.] to be making this up; isn't that correct?
> A: (Pause.) I didn't do nothin' [sic] wrong, sir.
> Q: You're not answering my question. You can think of no reason why [H.R.] would make this up.
> MR. SCHILE: It calls for an opinion, Your Honor.
> ….
> THE COURT: It's argumentative, if you could rephrase your question.
> BY MR. JACKSON (Continuing)
> Q: Did you tell the detective that you could think of no reason for [H.R.] to make this up?
> A: I don't remember telling that to the detective.
> Q: You don't.
> A: No, I don't, sir.

> Q: But you just said in open court that you can think of no reason why [H.R.] would be mad at you; isn't that right?
> A: That's right
> ….
> Q: In fact, you laid [sic] down next to her and touched her privates, touched her vagina.
> A: I did not do no [sic] such thing, sir.
> Q: *So what you would say is that this is a little girl who has no reason to be made at you, has come forward and made this up for no reason at all*.
> A: It's possible.
> Q: It's also possible that you did these things, as she indicates.
> A: I did no such thing, sir.

State v. Boehning, supra 524.

A portion of the direct examination of Detective Satake follows:

> Q. All right, Detective, have you heard that recording before?
>
> A. Yes, I have.
>
> Q. Where did that recording come from?
>
> A. It came from the 911 recordings.
>
> Q. And to your knowledge, what is that a recording of?
>
> A. That is a recording that Mr. Gmeiner called in to 911, and it's recorded which he was reporting.

> Q. Detective Satake, in the course of your investigation into this particular case were you able to find any evidence of a motive for Sarah Gmeiner to fabricate this story about her brother?
>
> A. No, I did not.
>
> Q. Did you find evidence of any kind of motive to exaggerate what had happened between her brother and her daughter, Ava?
>
> A. No, I did not.

(Cochran RP 848, ll. 4-19)

V. CUMULATIVE ERROR

> …[R]eversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Budda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence. *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any

> reasonable jury would have reached the same result in absence of the error. *Whelchel,* 115 Wn.2d at 728; *Guloy,* 104 Wn.2d at 425. Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Halstein,* 122 Wn.2d 109, 127, 857 P.2d 270 (1993); *State v. Tharp,* 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

State v. Lopez, 95 Wn. App. 842, 857, 980 P.2d 224 (1999).

The combination of the trial court's failure to comply with the strictures of RCW 9A.44.120, ineffective assistance of counsel and prosecutorial misconduct satisfy the claim of cumulative error.

CONCLUSION

The violation of Mr. Gmeiner's right to not be placed in double jeopardy, as guaranteed by the Fifth Amendment and Const. art. I, § 9 requires reversal of his conviction and dismissal of the case.

In the event the Court declines to find a violation of double jeopardy, then the trial court's non-compliance with RCW 9A.44.120 necessitates reversal of Mr. Gmeiner's conviction and remand for a new trial.

Mr. Gmeiner is also entitled to a new trial due to ineffective assistance of counsel, prosecutorial misconduct and cumulative error. His right to a fair trial under the Fourteenth Amendment and Const. art. I, § 3 was

violated; as was his right under the Sixth Amendment and Const. art. I, § 22.

DATED this 27th day of November, 2017.

Respectfully submitted,

s/ Dennis W. Morgan
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APPENDIX “A”

37. ABG's statements to her mother were made at a time that supports reliability—specifically, she made the comments the night of the events when they would have been fresh in her own mind;

38. ABG's lack of knowledge could not have been further developed through cross-examination because her mother saw the very events ABG was describing;

39. Because the statements were made the night of the event, the likelihood that ABG's recollection was faulty was extremely remote;

40. The surrounding circumstances support the reliability of and corroborate ABG's statements: ABG's description of events exactly matched Sarrah's own observations, and the defendant confirmed certain elements of the statements in his own statements to police (e.g., that he was present at the home and that he had physical contact with ABG);

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Having found these facts proven by at least a preponderance of the evidence, and having found Sarah Gmeiner to be a credible witness, the Court hereby makes the following:

CONCLUSIONS OF LAW

1. ABG is unavailable for testimony either in a pretrial hearing or at the trial itself;
2. ABG's statements to her mother and Joanne Gmeiner bear sufficient indicia of reliability to satisfy the requirements of the Child Hearsay Statute;
3. ABG's statements are therefore admissible in the State's case-in-chief;
4. The Court adopts all oral conclusions herein.

DATED THIS 23 day of May, 2017.

JUDGE
MARYANN C. MORENO

Presented by:

DERIC A. MARTIN
Deputy Prosecuting Attorney
WSBA # 28279

Agreed as to form:

KYLE ZELLER
Attorney for Defendant
WSBA # 28160

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APPENDIX “B”

December 7, 2016 - P.M. Session

(JURY NOT PRESENT.)

THE COURT: So we're back on the record without the jury. The jury buzzed Tuija probably about 20 minutes ago and let her know that they were not able to reach a verdict. So they've been out since 11:30-ish. They've had lunch. Thoughts?

MR. MARTIN: Well, your Honor, I don't mean to be disrespectful to the jury, but this isn't a very long time for them to be out.

THE COURT: Mm-hm.

MR. MARTIN: I mean, it seems that they ought to at least go until the end of the day given that it's...

THE COURT: That's easy for you to say.

MR. MARTIN: Yeah. But I -- I just --

THE COURT: But I'm happy to keep them. I can have Tuija take them outside for a walk. I can -- I'll do whatever you want to do. I could send them home, have them come back.

MR. MARTIN: Your Honor, I'm happy to defer to the Court on that. My preference is just that they continue deliberating in whatever fashion your Honor sees fit.

(DISCUSSION HELD OFF THE RECORD BETWEEN DEFENDANT AND DEFENSE COUNSEL.)

THE COURT: What does the defense think?

MR. ZELLER: It's up to the Court's discretion a little bit. I don't know -- I mean, I don't know if it's like a pretty big divide where it's just clear that half of them aren't changing. I'd just leave it to the Court's discretion.

THE COURT: Well, I can have Tuija take them outside for a walk if they want to go. I can't force them to go out. I can have her tell them to continue deliberating. But they're locked in a room together. I can let them stay another hour or so if you want, half an hour, whatever you want.

MR. MARTIN: Well, Judge, I thought -- on consideration, I thought your idea for a recess, have them come back in the morning, is a good choice. If they --

THE COURT: Okay.

MR. MARTIN: -- decide as a group that they want to continue deliberating, if they think it's helpful, obviously I have no problem with that. And it's possible the night will give them all a chance to think about the case a little bit more.

(DISCUSSION OFF THE RECORD BETWEEN DEFENSE COUNSEL.)

MR. ZELLER: And I'm fine with that. We were also talking about we've had in the past, had the jury come out, talk to the presiding juror and just --

THE COURT: Yeah.

MR. ZELLER: -- see if -- if in their opinion that's going to be helpful.

THE COURT: Mm-hm.

MR. ZELLER: I don't know.

THE COURT: Well, generally I just ask them the question --

MR. CHARBONNEAU: Yeah.

THE COURT: -- and they just answer yes or no, "If I give you additional time, is there a chance of the jury reaching a verdict?" I can do that and then see what they say and then make a decision from there.

MR. MARTIN: My preference would be -- I think that whenever, you know, they feel that they've reached a deadlock and they've already sent a message to the court, again, given the amount of time that's elapsed I'm not sure they've really exhausted argument at this point. I think if they're given a chance, out of either mutual respect or embarrassment or whatever, they're going to say, "Yeah, we're deadlocked." Whereas I think if they're given the opportunity to leave and come back, then that might bring them to deliberations afresh.

THE COURT: You know, I hate to do that, because then Tuija's in a position where she's directing them as to what to do. I'm happy to -- I think we should bring them out, ask them the question, and then I can send a direct message through. But I -- I'm a little hesitant to send Tuija off as the messenger and tell them to go home and think about this and come back in the morning.

MR. MARTIN: Oh, I don't think that should be the message. I think that if -- I think that if Tuija were to say anything, my suggestion would just be: "We're recessing for the day. Please report at nine o'clock or 9:30," whatever your Honor's time is tomorrow, and leave it at that. I don't think that -- I don't think that they need to be -- I don't think she needs to give them any direction beyond time to go and return.

THE COURT: So do you want me to bring them in and ask them the question and then do that, or do you want me to just do that, send them home, have them come back in the morning? because I don't want -- I think they need to -- they rang, they pushed the buzzer affirmatively. It wasn't like Tuija went in and said, "Hey, what's going on?" They pushed it. They told her, "We cannot reach a decision." So...

MR. MARTIN: Judge, if the Court calls them in, since your Honor runs the courtroom, and has them come in, has the report from the presiding juror, and if your Honor's inclined to do this, to indicate to them at that point, "Well, we're going to recess for the night. We'll have you back tomorrow morning at X time and we'll check in then," I guess I'd like it that way. I just always feel that if the jury's going to be given the chance to take -- I hate to use the phrase "the easy way out," but in my view, given the amount of time that they've spent deliberating, that's what it is, I'd rather have them be put in the position where they're under an obligation to

continue making an effort. You know, they haven't listened to the 911 recording again. They haven't sent us any questions. That may just be that they understand the law and understand all the evidence and can't agree on it, or it may be that they haven't given it adequate time to think about.

THE COURT: What does the defense want to do? I'm going to sort of defer to you folks.

MR. ZELLER: I guess now I'm of the opinion that we bring them in, we ask the question, and maybe we just ask, like we normally would, if more time would be helpful.

THE COURT: Mm-hm.

MR. ZELLER: If they're so deadlocked that they're adamantly pushing the button and saying that -- and time isn't helpful, then we're just kind of wasting their time tomorrow as well.

THE COURT: Well, but I'm presuming that they're going to say, "No, we can't reach a verdict," and then it's going to be up to us to -- I don't want to rush into declaring a mistrial, but I can't really ask any more questions than "Will additional time give you a chance to reach a verdict?" Assuming that they say no, we have to decide whether we're going to release them or have them come back in the morning. We seem to keep going 'round in circles here with this.

MR. MARTIN: I just hate -- I hate wasting the court time, I hate wasting the parties' time, the defendant's time,

the witnesses' time. You know, we've already -- it's only been a three-day trial, but it's still a lot of effort.

THE COURT: Mm-hm.

MR. MARTIN: And it's a really big decision --

THE COURT: So --

MR. MARTIN: -- for both sides what to do if we have to retry this.

THE COURT: Well, do you want me to release them and just have them come back in the morning? Or do you want me to bring them out and ask them?

MR. ZELLER: That's fine if the Court feels it's appropriate.

THE COURT: What's that?

MR. ZELLER: That's fine if the Court feels that's appropriate.

THE COURT: Releasing them?

MR. ZELLER: That's fine.

MR. MARTIN: I under -- I understand the Court's hesitation about having them make a statement to the Court and then not answering the question. But on the other hand, if they're just told to return tomorrow, then they may not feel that they're being, I guess, imprisoned or kept against their will or anything like that. They may feel that they're going to come back tomorrow, and that's when the deadlock will be announced or that they may start again tomorrow afresh,

whatever. But I think if they're sent home tonight and told to report for deliberations tomorrow morning at your Honor's specified time, that's the best.

THE COURT: Versus bringing them in?

MR. ZELLER: What makes me a little nervous is if they are deadlocked and we're sending them home to come back tomorrow and they've said they're deadlocked, then some of them might think, "Well, now I've got -- I've got to say something one way or the other just to be done with this process," because they've said they can't reach a verdict and we're essentially not honoring that by telling them keep going. And at some point I get nervous that people are going to start switching their mind to be done with the process.

THE COURT: So what are you asking me to do?

MR. ZELLER: Bring them in, ask the question. If they can't reach a verdict, then I think we're at a mistrial.

THE COURT: All right. Let's go ahead and bring them in. Let's just start with that.

(JURY ENTERED THE COURTROOM.)

THE COURT: All right, good afternoon. You've been called back into the courtroom to discuss the subject of the reasonable probability of reaching a verdict. I want to caution you that because you have begun the deliberation process, it's important that you don't make any remarks which might adversely affect the rights of either party or which may

disclose the opinions of the jury.

I'm going to ask the presiding juror if there is a reasonable probability of the jury reaching agreement within a reasonable time. The presiding juror will simply answer yes or no and not say anything else or disclose any other information or indicate the status of your deliberations. Okay?

So who is our presiding juror?

JUROR NO. 12: (Hand raised.)

THE COURT: Okay. So my question is directed to you. Is there a reasonable probability of the jury reaching agreement within a reasonable time?

JUROR NO. 12: No. No.

THE COURT: Okay. All right, head on back to the jury room.

(JURY LEFT THE COURTROOM.)

THE COURT: Go ahead and have a seat. Okay, so Mr. Martin?

MR. MARTIN: Well, obviously it's discouraging from my perspective to have them come in and say that. I think it's still a reasonable statement for the Court to say, you know, given your time, our time, et cetera, it might make sense to deliberate. But I'm concerned that if they come back with a guilty verdict in that case and we go up on appeal, the appellate court could be concerned that the jurors were somehow coerced or told that they had to come to an answer. Your

Honor, I'm certain, has more experience with this than I do. Unfortunately I've had a little bit more experience with it lately. But, you know, honestly at this point, Judge, I'm prepared to defer to your judgment on that based on your experience and your read of the jury and with defense counsel.

THE COURT: Okay. What does defense counsel want?

MR. ZELLER: And I just get nervous, again, kind of as Mr. Martin was saying there, that if the jury comes back tomorrow with a verdict, that the appeal issue is that, you know, they essentially felt like they had to do something different than what they told us they've done. So I think at this point if they can't reach a verdict, I would just ask for a mistrial.

THE COURT: All right.

MR. MARTIN: Your Honor, the only thing I'd request, if we can, is if the Court or Tuija's comfortable doing it, if we could get what their split is?

THE COURT: Oh, if I declare a mistrial, you folks can go back.

MR. MARTIN: Okay. My only concern is if they don't want to stay and talk to us, we won't know.

THE COURT: They don't have to, but a lot of times they do.

MR. MARTIN: Okay. We'd just be curious. It'd help us figure out how we're going to proceed.

THE COURT: All right. All right. So we've had at least a full day and a half of testimony. And quite frankly, though, it's not really a complex case. There were not a lot of jury instructions. They're all pretty -- sometimes jury instructions are convoluted, you've got lesser included's. These instructions appeared to be pretty straightforward.

I don't know that the length of time really makes too much difference, and that's what the case law says. And they've been out since 11:30 and they've had lunch. And I don't -- again, it seems -- it appears in the manner in which the presiding juror answered that she was pretty certain that they were not going to be able to reach a verdict. So I am going to go ahead and declare a mistrial. Okay?

So just hold on a minute. And I -- if the attorneys want to go back, it would probably be a good idea to figure out what the split might be or -- or whatever you like. So do you want to do that and then we'll enter an order?

MR. MARTIN: Yeah, if that's fine with the Court.

THE COURT: Yes. Or if you want to enter an order and then we'll -- you guys could go back.

MR. MARTIN: I'm happy doing it either way. I don't -- I can write the order at any time.

THE COURT: Go ahead and scribble out an order and I'll sign it, and then we can take the defendant back and go from there.

APPENDIX “C”

A. Um, if there's follow-up information that needs to be investigated, yes, it is.
Q. So how would you differentiate your role in the case from the role of the patrol deputies who were sort of the first responders?
A. First responders get as much information as they can. But due to the -- the amount of calls they -- they have and the difference of calls they have, they're not as specialized or focusing on just this one thing like I am. Whereas I don't go out and investigate property crimes or robberies; I stick right with -- in that very narrow focus of the sexual assaults or physical abuses with children, of that nature. So it -- it differs quite a bit with the -- what questions I ask versus what they ask, because I deal with it more often. And so I -- I tend to ask a little bit more probing questions, try to get more detail and fill in some of the blanks in the incident which they didn't see at the time.
Q. Detective, have you ever been in a position as an SAU detective to, say, interview a victim or, you know, closely related eyewitness on the day of the actual event and then have the opportunity to interview them some point later?
A. Yes, I have.
Q. In the experience that you have doing that, have you noticed if there's any kind of change in demeanor from people right after an incident to the following days or weeks?

A. There is.
Q. Could you describe what your experience has been?
A. These situations are very traumatic, very personal right off the bat. And for somebody that's that close to it, it -- it's very shocking. And so even though they've recorded that whole incident in their mind, not everything is coming up right away, because you -- they keep going back to that shocking point. When they've had some time to process it in their mind, they're able to go through that a little bit more detailed and be able to remember a lot more of what goes on or what happened during that incident. And it could be slightly different from that -- that first initial witness interview we had with them.
Q. From the experience that you've had in the SAU, have you found it to be common or rare to be able to get more detail or more facts about an incident from a witness once they've had the chance to calm down?
A. It's pretty common that we see more detail once -- once they've had a little bit of time to process it and go over it in their mind.
Q. Now, when you spoke to Ms. Gmeiner, it looks like a few days had gone by between the incident and your interview?
A. That is correct.
Q. And was Ms. Gmeiner willing to talk to you, cooperative in the interview?
A. Yes, she was.

APPENDIX “D”

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SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY	
State Of Washington and Washington State	CASE NO. 2016-01-03798-5
Plaintiff/Petition vs. Jerremy Joe Gmeiner Defendant/Respondent	**INQUIRY FROM THE JURY AND COURT'S RESPONSE**

JURY INQUIRY: IS THERE A LEGAL DEFINITION OF " OTHER INTIMATE PARTS OF A PERSON" ?

Dated: 4-12-2017 Signature: _____
Presiding Juror

COURT'S RESPONSE, AFTER AFFORDING ALL COUNSEL THE OPPORTUNITY TO BE HEARD:

Please refer to the instructions

_____
SUPERIOR COURT JUDGE

Date and Time Returned to Jury: 4-13-17
Reported By: T Cochran

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NO. 35370-2-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. JERREMY JOE GMEINER, Defendant, Appellant.	)	SPOKANE COUNTY NO. 16 1 03798 5 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 27th day of November, 2017, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

COURT OF APPEALS, DIVISION III — E-FILE
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